

## **INTRODUCTION: INSURANCE LAW AND EVOLVING SANCTIONS**

### **ABOUT A NEW BALANCE IN THE MUTUAL OBLIGATIONS OF BOTH PARTIES TO A CONTRACT OF INSURANCE AND A NEW SYSTEM OF SANCTIONS**

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As soon as, being a Professor in Insurance Law, you are asked to guest edit an issue of *Erasmus Law Review (ELR)*, the process of thinking about a suitable topic starts immediately. The reader, the target group, after all, is internationally orientated and diverse, so learns the Mission Statement of *ELR*. And wouldn't it be rather nice to show that reader – especially when he is not that well acquainted with Insurance Law – how this specialism develops?

The development that characterises insurance law in the past decades is most clearly reflected in the legislation itself: new insurance law legislation<sup>1</sup> has strengthened the position of the insured – as a consumer – considerably. In order to achieve this higher level of protection, the number of mandatory provisions has been considerably extended, particularly where consumer insurance is concerned. The context behind this development is clear: the insurance contract must offer protection, and in order to guarantee that protection, safeguards are incorporated by the legislator, already mentioned, as well as in case law.

These safeguards, the guarantees for protection, consist of a duty on the insurer's side to be a prudent insurer with a duty to warn or to inform the insured on the one hand. That is through legislation,<sup>2</sup> but also in case law, the insurer is more and more obliged to adopt a proactive approach to protect the interests of the insured. Especially these assigned obligations may come as a surprise to the insurer. But also here, the context is clear: it is the insurer who is informed best and in the best position to prevent the insured from losing his rights unnecessarily. This well-informed position provides responsibilities.

On the other hand, the level of protection of the insured in new insurance law exists of a more balanced, a softer, sanction regime. It no longer has the so-called always nothing principle as a sanction when the insured fails to fulfil his obligations under the policy, but a proportional approach. Proportionality, for instance, not only as a sanction for failure to disclose when taking out insurance, but also as a sanction in case the insured does not live up to his duty to inform the insured of an event.

A third development that is worth describing in the issue at hand is the increasing pressure on the insurer to act as a prudent insurer too at the time the risk insured materialises: the insurer shall operate energetically in the process of claim handling. But also, what is the sanction regime if he does not?

The insured, thus, is protected in several ways. At the same time, though, there is a clear cut in this routine of protection in case the insured oversteps the mark himself. The insured who misleads the insurer deliberately will face the most severe consequences: law and case law denies the insured any right to payment; it is generally accepted that in case the insured has acted with the intent to mislead the insurer, the latter is entitled

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<sup>1</sup> Good examples are Title 7.17 of the Dutch Civil Code (DCC) in The Netherlands per 1 January 2006 and the German Insurance Contract Act of 1 January 2008.

<sup>2</sup> Appealing in this perspective is Sect. 7:934 DCC: only the failure to pay after a formal demand issued after the due date can result in termination or suspension of cover.

to terminate the contract and – also as a rule – that this intentional or even fraudulent behaviour will be registered in special data files. With all the associated consequences for the future and the difficulties he will meet, if he wants to get coverage again.

It is in this context that I asked my ‘desired authors’ to write an article on a quartet of pieces, relevant for this development.

Han Wansink and Niels Frenk focus in their contribution on one of the major developments in the field of insurance law, which are characteristic of the growing significance of the social function of insurance. They have in view the fact that insurers are increasingly reminded of the fact that they are the ‘professionals’ in situations, where the insured threatens to become the victim of the fact that he is a layperson and for that reason may lose his insurance coverage, unless the insurer takes positive action. Therefore, the insurer is increasingly required to adopt a proactive approach to protect the interests of the insured. They describe some cases, wherein this positive action is required from a prudent insurer such as a duty to warn or to inform the policyholder/insured, and the consequences for the insurer if he does not fulfil these duties.

Helmut Heiss describes the introduction in the new German Insurance Contract Act (ICA) of the rule of ‘proportionality’ as an example of a new level of protection in insurance law on behalf of the insured, which is in line with modern concepts of consumer law. This new principle rule through which the ability of an insurer to discharge its liability is limited replaces the so-called all-or-nothing principle. This is achieved by reducing the insurance money in proportion to the degree of fault apportioned to the policyholder. However, the right of an insurer to reduce the insurance money payable is limited to cases in which the policyholder has acted with gross negligence. In cases of ordinary negligence, the entire insurance money will be payable. In contrast, the insurer will be fully discharged in cases of intentional or even fraudulent behaviour by the policyholder. Heiss underlines that the Principles of European Insurance Contract Law (the PEICL) give some space to an insurer to introduce a clause into the policy ‘providing for a reduction of the insurance money according to the degree of fault’ on part of the policyholder or insured as the case may be and thereby adopt the rule of ‘proportionality’.

In his contribution, Malcolm Clarke discusses the consequences of late payment of insurance money. More specifically, he focuses on the question whether the insurer who is ‘not justifiably slow to pay’ needs to compensate the insured for the damage he suffered as a result of this failure to pay. Clarke shows that the balance of precedent in the reported insurance cases in England is against the insured who seeks full compensation as damages from the insurer in breach. Clarke explains the difference between contract law at large (where a claimant *can* recover damages) and insurance law with reference to what he calls ‘the bizarre rule of English insurance law’ that payment of insurance money is not payment of a debt (in respect of an insured loss), but payment of damages (compensation) for failure to perform a promise to hold the insured harmless against a specified loss or expense. In his ‘View from Abroad’, Clarke shows that England – in the wider field of common law countries – is the exception here and that ‘for common law countries at large there is hope’. That also counts for the PEICL, that states in Article 1:105 (2) that ‘the claimant shall be entitled to recover damages for any additional loss caused by late payment of the insurance money’.

The last contribution of this issue is an article of Herman Cousy. He illustrates in an appealing way the ways and manners in which the process of legislative reforms in insurance contract law took place during the last 20 years in many EU Member States. At the end, he concludes that in the course of this process of law reforming, modern insurance law has been contaminated with some light degree of ‘schizophrenia’, or at least with a kind of ‘hybridity’, which may give rise to uncertainties in its interpretation, its application and its implementation. Modern insurance law and legislation increasingly tend to protect the insurance consumer by introducing several protective devices that draw their inspiration from the sphere and the logic of consumer law. But, while creating these – as he calls them – ‘Nebenpflichten’, legislators in his view have not abandoned the basic principles of traditional insurance law, which were and are clearly inspired

by a different logic and goal, namely the will to protect the insurer and to support and promote the insurance business. It is therefore that he states that modern insurance law remains hybrid.

Cousy's final conclusion underlines not only the necessity to continue the process of reforming insurance contract law as described in this special issue of *ELR*, but also in doing so to have an eye for what is happening outside the borders of one's own national law.